



Dustin Allison  
Acting Public Counsel

State of Missouri

Jay Nixon  
Governor

**Office of the Public Counsel**  
Governor Office Building  
200 Madison, Suite 650  
PO Box 2230  
Jefferson City, Missouri 65102

Telephone: 573-751-4857  
Facsimile: 573-751-5562  
Web: <http://www.mo-opc.org>  
Relay Missouri  
1-800-735-2966 TDD  
1-866-922-22959 Voice

January 1, 2015

Mr. D. Adam Crumbliss  
Chief Clerk of the House  
201 West Capitol Ave, Room 306C  
Jefferson City, MO 65101

Ms. Adriane Crouse  
Secretary of the Senate  
201 West Capitol Ave, Room 325  
Jefferson City, MO 65101

### **2014 Report of the Ombudsperson for Property Rights**

The Office of Ombudsperson for Property Rights, created in 2006 by House Bill 1944 and located in the Office of the Public Counsel, is tasked with assisting “citizens by providing guidance, which shall not constitute legal advice, to individuals seeking information regarding the condemnation process and its procedures” (§ 523.277, RSMo). The ombudsman is required by § 523.277 to document the use of eminent domain within the state and any issues associated with its use, and shall submit a report to the general assembly on January 1, 2008, and on such date each year thereafter.

Numerous landowners contacted the Office of Ombudsperson for Property Rights (“Ombudsperson”) with eminent domain questions regarding the condemnation of their land. The issues brought to the Ombudsperson included simple process issues involving the timing between steps in the condemnation process, questions about the valuation of property subject to condemnation, and questions about the enforceability of acquisition agreements. The Ombudsperson provided guidance to Missouri citizens on these and many other issues.

#### **A. Eminent Domain Cases in Missouri Court of Appeals**

Missouri’s Court of Appeals heard only a handful cases in 2014 involving eminent domain issues. Below is a summary of a few of the more noteworthy eminent domain cases from 2014 and the issues raised in those cases.

**1. City of North Kansas City, Missouri v. K.C. Beaton Holding Company, LLC,**  
417 S.W.3d 825 (Mo. App. W.D. 2014). Opinion filed January 14, 2014.

The City of North Kansas City sought to condemn property owned by K.C. Beaton Holding Company, LLC upon which Gilbertson Restaurants, LLC operates a Burger King restaurant. The City had determined that 57 acres of land within the city were blighted, and sought to acquire the land through condemnation, which included the site of the Burger King. In 2012, the Circuit Court of Clay County dismissed the City's petition in condemnation and concluded that the City did not have the authority to condemn the property under Section 88.497, RSMo for the "public purpose" of eliminating blight. The City appealed. The issue raised on appeal was whether eliminating blight is a public purpose under Section 88.497. The Western District Court of Appeals affirmed the dismissal of the City's condemnation petition. The Court concluded that eminent domain statutes are to be strictly construed, and, "We find nothing within Section 88.497 which expressly gives third class cities the power of eminent domain to eliminate blight, nor do we find anything within Section 88.497 which necessarily implies that third class cities have such power. A third class city's general authority to condemn under section 88.497 "for any other necessary public purposes" is not sufficient to condemn for blight without a manifested intent by the legislature stating in express terms or by necessary implication that third class cities have such authority."

**2. State of Missouri, ex rel. Watson v. Sherry,**  
436 S.W.3d 618 (Mo. App. E.D. 2014). Opinion filed July 8, 2014.

The City of Richmond Heights adopted an ordinance effective August 12, 2006 pursuant to the Real Property Tax Increment Allocation Development Act, Sections 99.800 to 99.865 RSMo (the "TIF Act"). The TIF Act authorizes utilities to use eminent domain to take private property to facilitate redevelopment. The City ordinance designated 63 acres as a redevelopment area, found that such area was blighted, and approved a redevelopment plan and project for the area. The Circuit Court of St. Louis County entered an order in 2008 condemning the property, including property owned by Watson in co-tenancy with others. The court-appointed commissioners assessed damages for the condemnation of the property, but the City did not pay the commissioner's award until 2013. Watson filed a Petition for Writ in Prohibition to prohibit the City from taking action on the condemnation because the authority to proceed on the condemnation had lapsed. The Eastern District Court of Appeals, Writ Division, prohibited the City from taking action on the condemnation. The Court concluded that the City's payment of the commissioner's award was late and past the expiration of the five-year time period allowed by Section 99.810, RSMo.

**3. City of Kansas City v. Powell,**  
Docket No. WD76861. Opinion filed October 7, 2014.

In June 2012 the City of Kansas City passed Ordinance 120509, which authorized the condemnation of various private properties for the purpose of constructing and maintain a police station and crime lab. In July 2012, the City filed a petition in condemnation, invoking the authority granted to it to condemn property through eminent domain by Section 82.240.

Powell argued that the lower court misapplied the law insofar as it failed to appoint disinterested commissioners to determine Powell's damages. Powell alleged that because the commissioners appointed for her case were also appointed for other condemnation actions with

the same project, they were not disinterested as required by Section 523.040. The Court of Appeals disagreed and pointed to the fact that the commissioners filed an oath affirming they were disinterested in the outcome of the proceeding, and that nothing in the record indicating that their prior experiences affected in any way their valuation of Powell's property.

Powell also argued that the condemnation petition should be dismissed because Powell was not allowed to conduct discovery, but the Court concluded that property owners are entitled to discovery on a condemnation petition only when they challenge, through a motion to dismiss, the condemning authority's claim of necessity as constituting fraud, bad faith or an arbitrary and unwarranted abuse of discretion.

Powell also argued that the property was not condemned for a public purpose. The Court concluded that the building and maintenance of a police station was a public use. The Court stated that it "must defer to a...legislative determination that the use of eminent domain is necessary to effectuate that public purpose *unless* the objecting landowner proves that the condemning party's claim of necessity constitutes fraud or bad faith."

## **B. Eminent Domain Cases in Federal Courts**

The following federal cases involving eminent domain issued in 2014 are of note for their potential impact in Missouri:

### **1. Alliance Pipeline L.P. v. 4.360 Acres of Land,** 746 F.3d 362, 367 (8th Cir. N.D. 2014)

Landowners appealed a district court order condemning their property for construction of a pipeline owned and operated by Alliance. The United States Court of Appeals for the Eighth Circuit held that condemnation actions under Federal Rule of Civil Procedure 71.1 preempted state procedure. Accordingly, the landowners were not entitled to a jury trial in eminent domain proceedings.

### **2. Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Twp.,** 768 F.3d 300, 305 (3d Cir. Pa. 2014)

The United States Court of Appeals for the Third District considered whether an interstate natural gas company had the right of eminent domain to obtain easements over the land of objecting landowners, outside of the existing right of way, in order to replace deteriorating pipeline. The Court held that, by their terms, 18 C.F.R. §§ 157.203(b) and 157.208(a) of the Natural Gas Act specifically and automatically authorized the main line replacement as a routine activity in connection with an eligible facility that could not be located in the same right of way or same site, and the company had the right to "self-implement" without further authorization from the FERC.

The Court noted a distinction between a "blanket certificate" and merely possessing a certificate of public convenience and necessity ("CCN") authorizing construction of a mainline, for instance. With a CCN, Columbia Gas would have been limited to replacing within the same right of way. However, with a blanket certificate, Columbia Gas was not limited to replacing within the same right of way.

**3. Northwest Pipeline LLC v. Swanson,**  
2014 U.S. Dist. LEXIS 153425 (W.D. Wash. Oct. 29, 2014)

Northwest Pipeline, LLC possessed a blanket certificate of convenience and public necessity from the FERC which granted Northwest the power of eminent domain. The United States District Court for the District of Washington held that to exercise that authority, the CCN alone is insufficient - Northwest must first obtain an order of condemnation.

**4. City of Joliet v. Mid-City Nat'l Bank of Chicago,**  
2014 U.S. Dist. LEXIS 130800 (N.D. Ill. Sept. 17, 2014)

The City of Joliet, Illinois, sought to acquire a housing complex through eminent domain for the purpose of expanding a city park. The property owners argued, among other things, that the property was already being devoted to a “public use” as low-income HUD housing, and that Joliet was therefore precluded from acquiring the property through eminent domain. The Court rejected the application of the prior public use exception to private property.

**C. Large Missouri Projects Involving Eminent Domain**

**1. Grain Belt Express**

The most notable eminent domain issue for Missouri in 2014 may be the **Grain Belt Express**, the proposed 750-mile overhead power transmission line that would deliver wind-generated power from Kansas through Missouri to states further east. On March 26, 2014, Grain Belt Express Clean Line, LLC, filed an application with the Missouri Public Service Commission (“MPSC”) for a certificate of convenience and necessity authorizing the Company “to construct, own, operate, control, manage and maintain electric transmission facilities within Buchanan, Clinton, Caldwell, Carroll, Chariton, Randolph, Monroe and Ralls Counties, Missouri, as well as associated converter station in Ralls County.” The transmission line would enter Missouri by crossing the Missouri River south of St. Joseph, and 206 miles later, exit Missouri by crossing the Mississippi River south of Hannibal.



In August and September of this year, the MPSC held public hearings and accepted sworn testimony from interested parties, including landowners, in each county through which the line is proposed to be built. The MPSC also held an evidentiary hearing in November regarding the Company's request, and the issues raised during the hearings are now before the MPSC awaiting a decision. Should the MPSC vote to approve GBE's application, a number of eminent domain issues likely will arise as GBE seeks to acquire property for the transmission line.

## 2. Flanagan South Pipeline Project

Enbridge Energy Company, Inc. through its affiliate Enbridge Pipelines, LLC, is constructing a pipeline project to bring crude oil from Illinois, across Missouri, to a refinery in Oklahoma. Enbridge describes the status of this project as follows:

“Enbridge Pipelines (FSP) L.L.C. is nearing completion of construction on the Flanagan South Pipeline Project – a nearly 600-mile, 36-inch diameter interstate crude oil pipeline that originates in Pontiac, Ill. and terminates in Cushing, Okla., crossing Illinois, Missouri, Kansas, and Oklahoma. The majority of the pipeline parallels Enbridge’s Spearhead crude oil pipeline right-of-way. Enbridge is also installing seven pump stations including one at the Flanagan Terminal and six along the pipeline route. Initial capacity will be approximately 600,000 barrels per day (bpd), with an ultimate design capacity of about 880,000 bpd after pumping-power enhancements.”

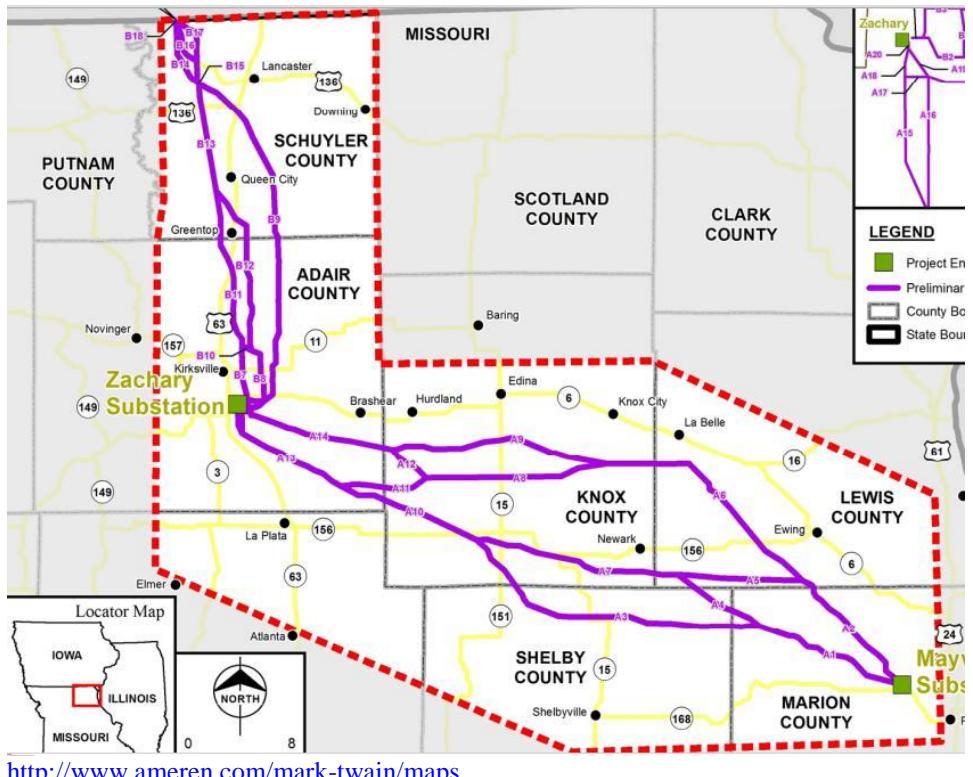


<http://www.enbridge.com>

## 3. Mark Twain Transmission Project

Ameren Corporation proposes to build a transmission line in northeast Missouri, which Ameren has referred to as the Mark Twain Transmission Project. The transmission line is proposed to run from Palmyra to Kirksville, and then turn north into Iowa. Ameren has held several open house meetings in the affected area to answer questions and receive feedback on the proposal. To date, no applications for the proposed project have been filed with the Missouri Public Service Commission.

In 2012, Ameren Transmission Company of Illinois (ATC), a subsidiary of Ameren Corporation, filed a two-count petition for declaratory relief against the Missouri Public Service Commission (MPSC) (Case No. 12AC-CC00499). The first count sought a declaration from the Circuit Court of Cole County that the MPSC has no jurisdiction, control, or regulation over ATC, and the second count sought a declaration that the MPSC does not have siting authority over ATC's construction of interstate transmission lines. On October 23, 2014, the Circuit Court granted a motion for summary judgment in the MPSC's favor, and found that the MPSC has not taken any administrative action against ATC and, therefore, the Court found no controverted fact and no justiciable controversy. ATC appealed the Circuit Court's judgment to the Western District Court of Appeals in pending Case No. WD78141.



#### 4. Southwestern Electric Power Company Transmission Line

Southwestern Electric Power Company (SWEPCO) proposes to construct an electric transmission line that begins and ends in northwest Arkansas. The proposal includes several possible routes, and one route (Route 109) would have the transmission line enter Missouri and cross the Missouri counties of McDonald and Barry for approximately 25 miles before exiting back into Arkansas. To date, SWEPCO has not applied for approval from the Missouri Public Service Commission.

This project was the subject of proposed Missouri legislation in 2014 seeking to prohibit its construction in Missouri, including SB 839, HB 1292, and HB 1774. For example, HB 1774 "removes the power of eminent domain from all types of utilities and railroads with regard to

land used for the construction of electric transmission lines originating and terminating in a state other than Missouri and passing through either McDonald or Barry County.”

Sincerely,

Dustin J. Allison  
Acting Public Counsel  
200 Madison Street  
Jefferson City, MO 65102